WONG LAI YOKE & ORS

v.

MAYBAN INVESTMENT MANAGEMENT SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D8-22-1426-2004]
18 OCTOBER 2010

SECURITIES: *Stockbroker - Negligence - Recommendations by adviser - Purchase of shares by plaintiffs resulting in loss - Whether plaintiffs induced to purchase shares - Whether misleading representations made by defendants - Whether reasonable measures taken by adviser for making recommendations - Whether plaintiffs warned of risk factors - Whether plaintiffs' investment objectives failed - Whether disclaimer an effective defence - Securities Industries Act 1983, ss. 40A, 86, 87A & 88A*

In 2001, Idris Hydraulic (M) Bhd (IHMB) underwent a restructuring exercise which was achieved by means of reconstruction and was effectively a reverse take-over by another company, Idaman Unggul Berhad (IUB). The restructuring scheme, amongst others, involved the issuance of renounceable rights issues of new IUB shares. Upon completion of the restructuring exercise, IUB assumed the listing status of IHMB and offered its shares for sale to the public. The 2nd defendant, a licensed stockbroker company, was a subscriber of the IUB shares for sale to its clients whereas the 1st defendant, a company carrying on the business as an investment adviser, was a client of the 2nd defendant. The 1st defendant had obtained the IUB shares from the 2nd defendant for placement to its own clients. The plaintiffs were share investors having an account each with the 1st defendant and were also the purchasers of the IUB shares. The recommendations made by the 1st defendant's Chief Executive Officer, one Mr. Amin (Amin), to the plaintiffs before the purchase of the said shares were *inter alia* that (i) the offer price for IUB shares was RM1.65 per share and that this would be the 'reference price' quoted for IUB shares on the listing day (ii) the information with respect to the price of IUB shares were reliable as the 2nd defendant was in close touch with the management of IUB (iii) it would be a sound investment as the plaintiffs would be able to recoup their initial capital investment and the balance for medium to long term capital growth or

appreciation and (iv) the management of IUB had indicated their intention to pay a minimum dividend of 3% by 2003. A copy of the 2nd defendant's publication entitled 'Equity Focus' and 'Company Update' (two publications), which contained a disclaimer appearing in both these publications, were each handed to the plaintiffs. Upon Amin's recommendation and assurance, the plaintiffs had, through their respective accounts, purchased the IUB shares. As Amin was well aware, the plaintiffs' investment objectives were to seek profits in the short, medium and long term basis from the purchase of their respective shares. On 20 November 2003, the IUB shares were listed at RM1.49 and closed for the day at RM1.09. Since then, the value of the shares dropped drastically which had induced the plaintiffs to sell their shares at a loss rendering the failure of their investment objectives. The plaintiffs' claim herein arose from the losses suffered by them in the purchase of the IUB shares *vide* the recommendation of the 1st defendant and reliance from the 2nd defendant's two publications. The issues that arose for consideration were whether the defendants were liable for the losses suffered by the plaintiffs (i) under the Securities Industry Act 1983 ('the Act') and/or (ii) in the tort of negligence at common law.

Held (allowing plaintiffs' claim under the Securities Industry Act 1983 against 1st defendant with costs):

(1) A prudent prospective investor in a company that had undergone a reverse takeover would have to satisfy himself of the financial standing of the company as it stood after the reverse takeover and to have considered the risk factors that the company would have to bear at least in the immediate and medium term before a decision was made to purchase its shares. Having determined the investment objectives of the plaintiffs under s. 40A(2)(a) of the Act, he was then bound under s. 40A(2)(b) and (c) of the Act, which was strictly statutory, requiring an adviser to have a reasonable basis to have made such recommendation. (paras 48-50 & 56)

(2) The abridged prospectus was a statutory requirement of company law and the rules and regulations of the Securities Commission and the Kuala Lumpur Stock Exchange to provide the investor, in the case of IUB which was undergoing the restructuring, with the background of the exercise, the main features of its business and prospects and

all such information deemed necessary to equip him with an informed choice whether to commit himself to invest in the company. The information contained therein could legitimately be used as a reference point for the purpose of determining whether the 1st defendant had a reasonable basis for making the recommendation to the plaintiffs to purchase the IUB shares to satisfy the requirement of s. 40A(2)(b) and (c) of the Act. (paras 60 & 61)

(2a) For the purpose of determining whether there was a reasonable basis for an adviser's recommendation, the absolute truth in the information of the abridged prospectus need not be proved as all that was required was the verification of the statements and information made or given by the issuer of the IUB prospectus which would form the basis upon which the investor would decide whether or not to invest. (para 62)

(3) It was reasonable to have expected the adviser to have obtained all the information with respect to the reverse takeover exercise in order to offer the plaintiffs such relevant information to enable them to make an informed choice of whether or not to invest. The 1st defendant could not have relied on s. 40A(4)(c) of the Act to exempt from liability. In making his recommendation to the plaintiffs, Amin had presented only the upsides of IUB but ignored some crucial downsides which should have been conveyed to the plaintiffs. (paras 65 & 67)

(4) The risk factors were not unknown at the time the recommendations were made and were easily discoverable by the 1st defendant. They were matters which related directly to sustainability of IUB as a going concern after undergoing the reverse takeover exercise and ought to have been in contemplation of a reasonably competent investment adviser. They were material and crucial factors which a prudent investor would have to seriously consider in deciding whether to make the purchase. An omission on the part of the 1st defendant to consider these factors and to advise the plaintiffs on this point therefore constituted a failure to give such consideration to the recommendation as may be reasonable in all the circumstances under s. 40A(2)(b) of the Act. (para 73)

(5) The term 'reference price' was clear and a term of art wherein a reasonably competent adviser would have known the meaning of the said term. Informing the plaintiffs that the 'reference price' meant the price at which the shares would be quoted on listing was clearly a serious misrepresentation. Failure on the part of Amin to have ascertained its exact meaning before proceeding to have recommended the purchase of the shares to the plaintiffs could have only meant that the adviser had failed to adequately give "such consideration to, and conducted such investigation of the subject-matter of the recommendation as may be reasonable in all the circumstances" which was contrary to s. 40A(2)(b) of the Act. (para 79)

(6) The duty of care imposed on the 1st defendant as an adviser would be the duty not to give negligent advice within the known investment objectives of the plaintiffs. But the mere fact that the IUB shares had failed to make a gain without more did not mean that the 1st defendant had breached its duty of care. By reason of the unpredictable nature of the stock market, losses could not of themselves provide evidence of negligence on the part of the 1st defendant for they could well be due to factors outside what had been recommended. (para 100)

(7) Merely by proving that the advice was contrary to what was stated in the prospectus or was based on wrong information would not be sufficient to prove that the 1st defendant was negligent at common law as the loss at the stock exchange might be due to other factors not related to any advice that the 1st defendant might have given. As no expert (nor any other witness) was called by the plaintiffs to prove that the failure had a correlation with the negligent advice of the 1st defendant, the plaintiffs' claim against the 1st defendant on the tort of negligence was plainly unsustainable. (para 103)

(8) The defendants, despite being subsidiaries of Malayan Banking Berhad, were separate legal entities and operated independently of each other. Besides, the civil liability for loss could have been imposed on the 2nd defendant or persons acting on its behalf if it had entered into the sale transaction of the IUB shares with the plaintiffs. As such, the plaintiffs' claim against the 2nd defendant under ss. 86 and 87A read with s. 88A of the Act failed. (paras 108 & 110)

(9) The plaintiffs did not rely on the two publications when they decided to purchase the IUB shares. Evidence showed that they relied on the advice of Amin. It was his sales pitch that caused them to buy those shares. The two publications were only handed over to them after Amin had recommended the purchase. Besides, the plaintiffs had not proved the causative element of the law on negligence attributing their loss to the breach of duty of care by the defendants. (paras 114-115)

(10) Even if negligence was proved, the 2nd defendant should have been able to rely on the disclaimer appearing in the two publications. Following the case of *Hedley Byrne*, a properly worded disclaimer may have exonerated the maker of a negligent misstatement from liability. The disclaimer was conclusive and afforded the 2nd defendant with an effective defence against any claim for economic loss from any stranger, who might despite the warning, have relied on the statement in those publications. (paras 112 & 116-117)

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***

Borg & Ors v. Northern Rivers Finance Pty Ltd & Ors [2003] QSC 112 ***(refd)***

Hedley Byrne & Co Ltd v. Heller & Partners Ltd [1963] 2 All ER 575 ***(refd)***

Stafford and Another v. Conti Commodity Services Ltd [1981] 1 All ER 691 ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Legislation referred to:

Securities Industry Act 1983, ss. 2, 40A(2)(a), (b), (c), (4)(c), (d), (6), 86, 87A, 88A

For the plaintiffs - Dato' Loh Siew Cheang (Wong Mun Hoe with him); M/s Cheang & Ariff

For the 1st defendant - Lambert Rasa-Ratnam (Sean Yeow Huang-Meng with him); M/s Lee Hishammuddin Allen & Gledhill

For the 2nd defendant - Ariff Rozhan (William Lim with him); M/s Zaid Ibrahim & Co

[Editor's note: The Securities Industry Act 1983 has been repealed by the Capital Markets and Services Act 2007.]

Reported by Kumitha Abdul Majid

A

JUDGMENT

Kang Hwee Gee J:

Introduction

B **[1]** In 2001, Idris Hydraulic (M) Bhd ("IHMB"), a distressed PN4 company of the Kuala Lumpur Stock Exchange ("KLSE"), underwent a restructuring exercise.

[2] The exercise was achieved by means of capital reduction and
C reconstruction, corporate reconstructing and debt reconstruction and was effectively a reverse take-over ("RTO") of IHMB by another company Idaman Unggul Berhad ("IUB").

[3] The restructuring scheme amongst others involved the
D issuance of renounceable rights issues of 42 million new IUB shares at RM1 each on the basis of three new IUB shares for every 1 IUB shares held. It also involved a new subscription in cash for 150 million new IUB shares by a white knight Dato' Che Mohd Annuar Senawi.

E **[4]** Upon completion of the restructuring exercise, IUB assumed the listing status of IHMB.

[5] The exercise enlarged the issued capital of IUB and to comply with the KLSE 25% public shareholdings requirement IUB
F was required by KLSE to offer its shares for sale to the public.

[6] For this purpose Hwang-DBS Investment Bank ("Hwang-DBS") was appointed by IUB as its placement agent to place out 213,942,000 IUB shares to their institutional clients and high net
G worth private individuals. Of these, 57% were placed out to institutional clients with the balance of 43% to high net worth private individuals.

[7] The private placement was underwritten by a number of financial institutions amongst others, the 2nd defendant Mayban
H Securities Sdn Bhd who was also a subscriber of the shares for sale to its clients.

[8] The 1st defendant, Mayban Investment Management Sdn Bhd was a client of the 2nd defendant who in turn obtained IUB
I shares from the 2nd defendant for placement to its own clients.

[9] The only viable asset of IHMB was an insurance company called Tahan Insurance (M) Berhad ("Tahan") and upon completion of the restructuring process it became a wholly owned subsidiary of IUB.

The Claims

[10] The plaintiffs' claims arose from losses suffered in the purchase of the IUB shares by private placement on the recommendation of the 1st defendant as their paid adviser and reliance on the 2nd defendant's publications "Equity Focus" and "Company Update".

[11] They were brought under ss. 40A, 86, 87A and 88A of the Securities Industry Act 1983 ("SIA") and for breach of duty of care under the common law based on the particulars stated in the statement of claim.

[12] The defence of both the defendants was in essence a denial of liability under both the SIA and the common law.

[13] The 1st defendant did not call any witness to rebut the testimony of the plaintiffs describing how the recommendations were being made by its Chief Executive Officer, Mr. Amin Rafie Othman ("Amin"), who they alleged had induced them to purchase the IUB shares. On the other hand the 2nd defendant called its employee who co-authored their publications, Equity Focus and Company Update, to defend the integrity of the publications.

The Parties In This Suit

[14] The 1st plaintiff was an investor having an investment account with the 1st defendant to invest in securities trading through her husband Chua Hock Ann.

[15] The 2nd plaintiff was an investor having an investment account with the 1st defendant for the purpose of investing in among others, initial public offerings ("IPO") and reverse takeovers ("RTO").

[16] The 3rd plaintiff was an investor having an investment account with the 1st defendant to invest in securities.

[17] The 1st defendant was a company carrying on the business as an investment adviser or fund manager within the meaning defined under s. 2 of the SIA, then in force.

[18] The 2nd defendant was a company carrying on business as stockbroker licensed under the SIA and maintained a research unit carrying out research into viable securities for investment and publishing such research in its reports Equity Focus and Company Update which it circulated to its own clients.

How It All Began

[19] Chua Hock Ann, the husband of the 1st plaintiff, a British citizen, became acquainted with Amin through their golf outings. Sometime in the early part of 2003, Amin invited him to open a private non-discretionary investment banking account with the 1st defendant for the primary purpose of investing in IPO and RTO shares.

[20] After being advised of the advantages of the account Chua Hock Ann decided to open the account in the name of his wife Wong Lai Yoke the 1st plaintiff, a Malaysian citizen.

[21] The 3rd plaintiff Dato' Gulamoydeen bin Mohd Haniffa who happened to be present at the time when Amin was advising Chua Hock Ann on the benefits of opening the investment banking account decided to open one for himself.

[22] On Amin's recommendation both Chua Hock Ann and Dato' Gulamoydeen purchased through their respective accounts, a block of IPO shares of Englotechs Holding Berhad ("EHB") and Sumatec Corporation Berhad ("SCB") from which they were able to realise substantial profits.

[23] Dato' Gulamoydeen then introduced Amin to the 2nd plaintiff Tunku Hammam bin Tunku Sulong who subsequently opened a private discretionary investment banking account with the 1st defendant.

[24] The opening of the private investment banking account entailed in respect of each plaintiff the execution of an Investment Management Agreement with the 1st defendant.

[25] By cl. 2.1 of the Investment Management Agreement the 1st defendant was appointed the "investment manager of the portfolio of assets ("the fund") from time to time …" for the respective plaintiffs.

[26] By cl. 3.2 of the agreement the 1st defendant and its duly authorized officers commit themselves to undertake the following activities:

> a) execute transactions for the Investment Account subject to the provisions contained herein and the Investment Guidelines set out in the Second Schedule;
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> b) place orders for the execution of transactions for the Investment Account with or through any broker, dealer, bank or other financial institution ("an Execution Agent") selected at the discretion of Mayban Investment, so long as the transactions are effected in accordance with the rules, regulations and practices of the relevant market or exchange; and
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> c) give instructions to the Custodian (as defined in Clause 9) on all matters relating to the Fund.

[27] By cl. 3.3 of the Agreement, as investment manager of the fund, the 1st defendant shall:

> (a) constantly review the investments for the Fund and make recommendations to Client; and
>
> (b) account to the Client for rebates received by Mayban Investment from brokers (if any).

[28] The clauses in the agreement governing the management of accounts appear to be the same for both non-discretionary and discretionary accounts, the difference being:

- in the case of non-discretionary account it is provided that the 1st defendant can undertake the activities mentioned above only with the prior written instruction or authorization of the 1st and 3rd plaintiffs.
- in the case of discretionary account, cl. 3.1 authorised the 1st defendant and its duly authorized officers to undertake the activities mentioned without the need for further written confirmation or authorization from the 2nd plaintiff.

Investment Objective

[29] The plaintiffs' investment objectives as disclosed to the 1st defendant through Amin were almost similar. They were conservative investors and not stock market 'gamblers'. They were prepared to sell a substantial portion of the shares that they

purchased to recover a portion of their invested capital in the short term if the opportunity arises and would keep the balance for medium and long term capital gains. They were also prepared to sell the whole of their holding if they could make a profit. In essence therefore their investment objectives can be summarized as seeking profits in the short, medium and long term.

The Recommendation Of 1st Defendant

[30] The advice that the 1st defendant gave (through its CEO Amin) to all the plaintiffs were similar in substance although they were given on different occasions.

[31] A copy each of the 2nd defendant's publication entitled "Equity Focus" dated- 28 July 2003 and "Company Update" dated 8 August 2003 was given to each plaintiff at the respective meetings.

[32] They were first informed that:

- a restructuring exercise involving the reverse takeover of IHMB was ongoing whereby the listing status of IHMB would be taken over by IUB.
- Tahan (formerly known as Talasco Insurance Malaysia Berhad) the only viable company in IHMB group would after the reverse takeover become a wholly owned subsidiary of IUB. Since then Tahan had significantly increased its market share of the insurance business with its acquisition of The People's Insurance Co (Malaysia) Bhd and Tenaga Insurance Malaysia Berhad.
- Tahan was being led by one Dato' Annuar Senawi, the vastly experienced and politically connected former executive chairman of the government backed Malaysian National Insurance Berhad (MNI).
- Bank Negara was in the process of consolidating insurance companies in the country and IUB was targeted as an up and coming insurance company nurtured to be one of the country's 'anchor insurance company' and was likely to be issued with a Takaful licence by the Bank Negara Malaysia.

[33] They were advised that:

– the offer price by private placement was RM1.65 much below its fair value of RM2.29 as highlighted in Equity Focus. Both Equity Focus and Company Update had equated 'Offer Price' of RM1.65 per share to 'Reference Price' and they were assured that 'Offer Price' and 'Reference Price' meant the same thing and that this would be the quoted price of IUB shares on listing day.

– It would be a sound investment as they would be able to recoup their initial capital investment and keep the balance for medium to long term capital growth or appreciation, or dispose of all the shares for capital gains. Additionally, unlike other "hot shares" no premium cost was payable. According to Amin, the IUB shares would be mopped up by fund managers on listing especially by foreign fund managers who were on the lookout for 'IPO financial stocks'.

– Although the effect of the full conversion of both irredeemable convertible unsecured loan stocks-A ("ICULS-A") and irredeemable convertible unsecured loan stocks-B ("ICULS-B") would dilute and decrease the value of IUB to about RM1.84 per share, it was improbable that such dilution by conversion would happen sooner. An arrangement existed between the largest shareholder and ICULS holders that ICULS-A and ICULS-B would only be converted upon their respective maturity date of three and five years. This was said to have been indicated by IUB's management to the 2nd defendant and appeared in the Company Update. It was unlikely that conversion would take place sooner than when IUB hits RM2, as indicated by IUB's management in Equity Focus.

[34] They were assured that:

– the management of IUB has indicated an intention to pay a dividend by 2003 and has indicated a minimum dividend yield of 3% as stated on p. 5 of Equity Focus; that based on IUB's fair value of RM2.29, this will represent "a PE of 9.0X, a discount to the industry average of 17.3X". Amin told them that the dividend was attractive and stressed that it would again represent a 'discount' on the price if they wanted to keep the IUB shares.

– The information with respect to the price of the IUB shares was reliable as the 2nd defendant was in close touch with the management of IUB. The 2nd defendant had reconfirmed their forecast to be achievable as stated in Equity Focus.

The Purchase

[35] The plaintiffs were persuaded and influenced into making the investment in IUB shares by the oral recommendations of Amin which was fortified by the written representations contained in Equity Focus and Company Update. A discount of RM0.05 off the offer price of RM1.65 was offered for early purchase which they took advantage of.

[36] The 1st plaintiff (through her husband) purchased 2.5 million IUB shares at RM1.60 on 20 October 2003 for a total sum of RM4 million after having established a non-discretionary private investment banking account.

[37] The 3rd plaintiff after establishing a non-discretionary private investment banking account purchased 1 million IUB shares at RM1.60 from the 1st defendant on 9 October 2003 and a further 2 million at the non discounted price of RM1.65 on 20 October 2003. All in all he invested a total sum of RM4,900,000 in the purchase of the shares.

[38] The 2nd plaintiff purchased 1 million shares at RM1.65 on 15 October 2003 after establishing a discretionary private investment banking account with the 1st defendant, paying RM1,650,000 for the purchase.

The Loss

[39] The IUB shares were re-listed at the KLSE on 20 November 2003 at RM1.49 and closed for the day at RM1.09. The plaintiffs were disappointed. The counter failed to recover. It dropped drastically thereafter.

[40] The 1st plaintiff sold off 50,000 of her shares on 21 November 2003 at RM1.1000 and the balance six months later between 18 May 2004 and 18 May 2004 when the counter went down to as low as RM0.4000.

[41] The 2nd plaintiff sold off all his shares between 17 May 2004 and 28 May 2004 at between RM0.3990 and RM0.4903.

[42] The 3rd plaintiff sold off all his shares between 17 May 2004 and 21 May 2004 at between RM0.3990 and RM0.4903.

[43] All the plaintiffs suffered loss in their investment, their investment objectives having failed.

The Issues

[44] A detailed set of issues was settled before the late Justice Abdul Wahab Said Ahmad in the course of case management. They were framed in the form of questions, each requiring a ruling the effect of which is to needlessly curtail the approach in which the court might have to take to arrive at a decision after hearing evidence.

[45] Based on the pleadings, the dispute in this hearing can be resolved only by answering the following two questions:

i. Are the defendants liable for the loss suffered by the plaintiffs under the relevant sections of the SIA?

ii. Are the defendants liable for the loss suffered by the plaintiffs in the tort of negligence at common law?

Liability Of The 1st Defendant Under s. 40A Of The SIA

[46] Having read the submissions of the parties with respect to the relevant sections of the SIA I am satisfied that the 1st defendant's culpability under the Act as an adviser within the meaning ascribed there under is confined only to s. 40A under which a stringent statutory duty is imposed.

[47] Section 40A of the SIA provides that:

> (1) An adviser shall not make a recommendation with respect to securities or a class of securities to a person who may reasonably be expected to rely on the recommendation without having a reasonable basis for making the recommendation to the person.
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> (2) For the purposes of subsection (1), an adviser does not have a reasonable basis for making a recommendation to a person unless:
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> (a) the adviser has, for the purposes of ascertaining that the recommendation is appropriate, taken all practicable measures to ascertain that the information possessed and

A relied upon by the adviser concerning the investment objectives, financial situation and particular needs of the person is accurate and complete;

(b) the adviser has given such consideration to, and conducted such investigation of the subject-matter of the recommendation as may be reasonable in all the circumstances; and

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(c) the recommendation is based on such consideration and investigation.

C **[48]** The plaintiffs' complaint is however, not directed to the provision of s. 40A(2)(a) requiring the 1st defendant to take all reasonable measures to ascertain that the investment objectives, financial situation and particular needs of the plaintiffs are accurate and complete, but on s. 40A(2)(b) and (c) in that the 1st D defendant did not have a reasonable basis for making the recommendation as it had not given such consideration to, and conducted such investigation of, the IUB shares that it recommended as may be reasonable in all the circumstances and that the recommendation was not based on such consideration E and investigation.

The Duty Requirement Under s. 40A(2)(b) And (c) Of The SIA

F **[49]** The provision does not require any construction beyond the plain language of s. 40A itself.

[50] In the normal course a prudent prospective investor in a company that had undergone a reverse takeover would have to satisfy himself of the financial standing of the company as it stood G after the reverse takeover and to consider the risk factors that the company would have to bear at least in the immediate and medium term before a decision is made to purchase its shares. To discharge his duty under s. 40A an adviser is however required to do more. Having determined the investment objectives of the H plaintiffs under subsection (2) (a), he is bound under subsection (2) (b) and (c) to give "such consideration to, and conducted such investigation of, the subject-matter of the recommendation (in the instant case the IUB shares) as may be reasonable in all the circumstances;" and to ensure that "the recommendation is based I on such consideration and investigation."

The Scope Of s. 40A Of The SIA

[51] There is no case law in point in our jurisdiction with respect to the scope of s. 40A of the SIA.

[52] Persuasive guidance may however be sought from the decision of the Supreme Court of Queensland in *Borg & Ors v. Northern Rivers Finance Pty Ltd & Ors* [2003] QSC 112, (cited by counsel for the plaintiffs) on the equivalent Australian law on this point. They are to be found in ss. 851 and 852 (read together) of the Corporations Law (Cth) which were almost in *para materia* as our s. 40A.

[53] The case involved a claim for loss suffered in a tax minimizing scheme which the adviser had deceptively misrepresented as being lawfully tax deductable approved by the Australian Tax Office. Mackenzie J explained the operation of the law in the following passage of his judgment:

> Section 851 applies where a securities adviser makes a securities recommendation to a person who may reasonably be expected to rely on it and the securities adviser does not have a reasonable basis for making it. The concept of not having a reasonable basis for making a recommendation is defined, for the purposes of the section, as involving the following: the securities adviser does not have a reasonable basis unless;
>
> (a) he or she has given such consideration to and conducted such investigations of the subject matter of the recommendation as is reasonable in the circumstances, in order to ascertain that the recommendation is appropriate having regard to the information the securities adviser has about the person's investment objectives, financial situation and particular needs; and
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> (b) the recommendation is based on that consideration and the investigation.
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> It was submitted that the salesmen had not given reasonable consideration to or conducted reasonable investigations of the subject matter of the recommendation, that is to say, the underlying investment.

[54] The 'causal link' between the 'recommendation' and 'loss or damage' under s. 852 of the Corporations Law is explained in the following passage of the judgment of Mackenzie J:

Section 852 of the Corporations Law provides a remedy if four matters coincide. Section 852 also relates to breaches of s. 851 to which reference will be made later. The four matters are:

(a) the security adviser contravenes the relevant provision in relation to a security recommendation to a client;

(b) the client, in reliance on the recommendation, does or omits to do, a particular act;

(c) it was reasonable for the client to do, or omit to do, the act in reliance on the recommendation; and

(d) the client suffers loss or damage as a result of the act or omission.

If those four matters coincide, a securities adviser is liable to pay damages in respect of the loss or damage, subject to s. 852(3), in the case of s. 849 and s. 852(4) in the case of s. 851.

With respect to (b), (c) and (d), subject to s. 852(3), provided it is established that a client relied on a recommendation to invest in a scheme, and it was reasonable in all of the circumstances for the client to act on the recommendation, upon proof of loss or damage as a result of acting on the recommendation (ie, as a result of entering into the scheme) the security adviser would be liable to pay damages in respect of the loss and damage.

Discretionary Or Non-discretionary Account

[55] The term 'discretionary' and 'non-discretionary' defines the nature of the obligation of the adviser under the investment agreement that the plaintiffs signed. In the former the decision to purchase or to sell would have to be made by the 1st and 3rd plaintiffs themselves, and in the latter such a decision lies entirely in the hands of the adviser.

[56] The duty under s. 40A(2)(b) and (c) is strictly statutory requiring an adviser to have a reasonable basis to make such recommendation. The fact that the 2nd plaintiff had opened a discretionary account as opposed to a non-discretionary account would not in this instance displace the statutory duty placed on the 1st defendant. The uncontroverted evidence of the 2nd plaintiff himself is clear that he was subjected to the same sales pitch and recommendation as were the 1st and 3rd plaintiffs before him. He had committed himself to purchase the shares even before he signed up for the private investment banking account. The discretionary account that he subsequently opened serves only to facilitate the purchase.

[57] It follows therefore, the question of whether the 1st defendant (through Amin) had a reasonable basis to recommend the purchase would be the same for the 2nd plaintiff as it would be for the 1st and 3rd plaintiffs.

The Abridged Prospectus As The Basis For Determining Liability

[58] An authoritative source from which a prospective investor can obtain information on the publicly traded corporation is the prospectus.

[59] An abridged prospectus had in fact been issued by IUB for the benefit of subscribers of its rights issues and ICULS-B in the course of the restructuring exercise although it was unavailable at the time the recommendations were made to the plaintiffs.

[60] The document is a statutory requirement of company law and the rules and regulations of the Securities Commission and the KLSE to provide the investor, in the case of IUB which was undergoing the restructuring, with the background of the exercise, the main features of its business and prospects and all such information deemed necessary to equip him with an informed choice whether to commit himself to invest in the company.

[61] The information contained in the abridged prospectus could therefore be legitimately used as a reference point for the purpose of determining whether the 1st defendant had a reasonable basis for making the recommendation to the plaintiffs to purchase the IUB shares to satisfy the requirement of s. 40A(2)(b) and (c).

[62] The defendants admitted the authenticity of the abridged prospectus but not its content. For the purpose of determining whether there was a reasonable basis for an adviser's recommendation, the absolute truth in the information of the abridged prospectus need not be proved as all that is required is the verification of the statements and information made or given by the issuer of the IUB prospectus which would form the basis upon which the investor would decide whether or not to invest.

Availability Of Information On IHMB And IUB

[63] All documents including the financial statements necessary for the exercise would have been already in the hands of the

A underwriters as the restructuring exercise was at an advanced stage given that the offer price for private placement at RM1.65 had already been determined.

[64] The 1st defendant could have at this stage availed itself of
B all the documents of both IHMB and IUB to equip itself with all the necessary information to be in a position to give proper advice to its clients.

[65] It was therefore reasonable under the circumstances, to expect the adviser to have obtained all the information with
C respect to the reverse takeover exercise in order to offer the plaintiffs such relevant information to enable them to make an informed choice of whether or not to invest.

[66] The 1st defendant cannot therefore rely on s. 40A(4)(c) to
D exempt it from liability on the ground that "it is reasonable, having regard to the recommendation and all other relevant circumstances, for the person to do that act or to refrain from doing that act, as the case may be …".

E **[67]** Having considered the evidence I am constrained to find that in making his recommendation to the plaintiffs, Amin had presented only the upsides of IUB but had ignored some crucial downsides which should have been conveyed to the plaintiffs.

F **[68]** The abridged prospectus listed 14 risk factors that prospective investors should carefully consider before purchasing the rights shares and/or the ICULS-B, which should apply equally to investors considering purchase by private placements. These were factors which a reasonably competent adviser would have
G enquired into and considered before making any recommendation to his client. Of these Amin had failed to address at least three of the risk factors which I consider crucial.

[69] First, he had failed to address the fact that Tahan, the only company which would be able to generate income for IUB after
H the reverse takeover, was at most only a marginal insurance company given the disclosed fact (in the prospectus) that it could not comply with the minimum solvency margin requirement imposed by Bank Negara for insurance companies which may attract sanctions.

I **[70]** The abridged prospectus had (at para. 5.5) cautioned that a non compliance letter dated 13 February 2002 from Bank Negara had been issued which may expose Tahan to sanctions. The fact

that Tahan had failed to meet the solvency margin was known to the 1st defendant as it was disclosed in the 2nd defendant's Company Update. The probability that this factor may compromise the forecast net profit upside projected by Equity Focus in Table 1 showing a net profit of RM42.3 million for 2003, RM52.2 million for 2004 and RM65.3 million for 2005 cannot be ruled out.

[71] Second, he had failed to address the marketability of IUB shares. Paragraph 5.2 of the abridged prospectus (which also applies to ICULS-B) deemed it necessary to record the following warning to prospective buyers of IUB shares and ICULS-B:

> **5.2 Marketability of Idaman Unggul Shares and ICULS-B**
>
> There has been no public market for Idaman Unggul Shares and ICULS-B. There can be no assurance that an active market for the Idaman Unggul Shares and ICULS-B will develop upon their listing on the Main Board of the KLSE, or if developed that such a market can be sustained. The issue price of the Rights Shares and ICULS-B was determined after taking into consideration a number of factors including, but not limited to the depressed performance of IHMB's share price which had been trading below its par value at the time the issue price was fixed, future prospects of Idaman Unggul Group (upon completion of the Restructuring Exercise) and the industry in which Idaman Unggul Group is involved, the latest audited (at the time the issue price was fixed) NTA per share of IHMB Group at 31 December 1999 of RM0.10 and the Proforma NTA of the Idaman Unggul Group.
>
> There is no assurance that the respective issue prices will correspond to the price at which Idaman Unggul Shares and ICULS-B will trade on the Main Board of the KLSE upon or subsequent to its listing or the market price of the Idaman Unggul Shares and ICULS-B upon or subsequent to the listing of the Idaman Unggul Shares and ICULS-B will remain at or above the issue price of the Idaman Unggul Shares and ICULS-B.
>
> There can be no assurance that the conversion price of the ICULS-B will be "in-the-money" during the conversion period, which is the period commencing from the date of issuance of the ICULS-B up to and including the date falling five (5) years from the date of the issuance of the ICULS-B.
>
> Additionally, the ICULS-B are unsecured and shall rank *pari passu* with any other unsecured and unsubordinated obligations of the Company.

[72] Third, he had failed to address the commitment of IUB on the corporate guarantees that IUB had issued pursuant to the takeover exercise. This is stated at para. 5.11 of the abridged prospectus as follows:

> **5.11 Call on the Corporate Guarantees**
>
> Pursuant to the Restructuring Exercise, Idaman Unggul will issue corporate guarantees to the holders of the SPV RSLS. In the event that the SPV is unable to raise sufficient proceeds to redeem the SPV RSLS issued to the relevant Scheme pursuant to the Creditors' Schemes of Arrangement, the corporate guarantees to be issued by Idaman Unggul pursuant to the Corporate Guarantees can be called upon and Idaman Unggul will have to source the necessary funding for the settlement of the corporate guarantees.
>
> In addition, a joint and several guarantee and indemnity letter dated 24 June 2003 was executed by LHMB and Idaman Unggul to (among others) guarantee the payment of all moneys due or owing by Idris Hydraulic Properties Sdn Bhd ("IHP"), a wholly-owned subsidiary of IHMB, together with all interests, costs, commission and other charges and expenses and indemnify Ratus Galaksi Sdn Bhd ("RGSB") from all losses costs damages claims demands expenses interest which RGSB may suffer or incur by reason of any breach of any warranties, covenants and undertakings contained in the conditional share sale agreement ("SSA") entered into between IHP and RGSB on 24 June 2003. Further details of the said agreement is set out in Section 3.2 of Appendix XI of this Abridged Prospectus. In the event that the guarantee and indemnity are called upon, Idaman Unggul and/or IHMB will have to source the necessary funding for the settlement of such guarantee and indemnity.

[73] These risk factors were not unknown at the time the recommendations were made to the 1st and 3rd plaintiffs and were easily discoverable by the 1st defendant. They were matters which relate directly to sustainability of IUB as a going concern after undergoing the reverse takeover exercise and ought to have been in the contemplation of a reasonably competent investment adviser. They were necessarily material and crucial – factors which a prudent investor would have to seriously consider in deciding whether to make the purchase. An omission on the part of the 1st defendant to consider these factors among others and to advise the plaintiffs on this point therefore constitutes a failure to give such consideration to the recommendation as may be reasonable in all the circumstances under s. 40A(2)(b) of the Act.

[74] In due fairness to Amin the 2nd defendant's Company Update did report that Tahan margin of insolvency was "alarming" but this was not communicated to the plaintiffs in a manner that could be understood by the lay investor such as the plaintiffs. His duty under s. 40A cannot be discharged by merely giving the plaintiffs a copy of the Equity Focus and Company Update telling them to read it for themselves.

Misleading Statements

[75] But quite apart from the omissions Amin had also made certain specific representations which were clearly misleading. They are as follows:

Reference Price

[76] First, it would appear that the 1st defendant through its Chief Executive Officer, Amin, had been ill informed on what 'reference price' meant when the plaintiffs were advised that 'offer price' had the same meaning as 'reference price' and that the reference price of RM1.65 "would be the price quoted by KLSE prior to trading on the day of listing" and that "IUB will be quoted at RM1.65 on listing date."

[77] The term 'reference price' it is clear is a term used in the securities trade and is not 'offer price' nor "the price of IUB shares that would be quoted on the day of listing". This is clear from the evidence of Mr. Ponniah a/l P. Ramiah (PW6), the Head of Securities Market Operations, Bursa Malaysia. According to him all public companies whose shares were listed would have a 'reference price' before the market opens on every trading day which was actually the closing price of the previous trading day. But for shares of RTO companies which were to be relisted on the exchange the reference price was determined by taking the par value of the shares predetermined by the company and Securities Commission prior to relisting. In the case of IUB its par value was RM1. The purpose of fixing a reference price to a counter, he explained was to fix its trading limit, a purely regulatory exercise to control excessive price fluctuations and had nothing to do with the market price of the counter upon listing.

[78] The term was also explained by the 1st defendant's own witness Mr. Victor Teh Swee Hock, the Senior Vice President of Hwang-DBS Investment Bank to mean the price that was "fixed by the stock exchange at the time of listing and is usually fixed at

par value" and that "the par value of IUB shares at the time of listing was RM1" and that "it opened at RM1.49 on 20 November 2003 the day of listing."

[79] The term 'reference price' it is clear, is a term of art whose meaning a reasonably competent adviser would have known of. Informing the plaintiffs that the 'reference price' meant the price at which the shares would be quoted on listing was clearly a serious misrepresentation. A failure on the part of Amin to ascertain its exact meaning before proceeding to recommend the purchase of the shares to the plaintiffs could only mean that the adviser has failed to adequately give "such consideration to, and conducted such investigation of, the subject-matter of the recommendation as may be reasonable in all the circumstances" contrary to s. 40A(2)(b) of the Act.

Conversion Of The ICULS

[80] Secondly, contrary to what Amin had advised, nowhere was it indicated in the abridged prospectus that the ICULS holders would not be converting their ICULS until the price of the IUB shares reached RM2 nor that some form of arrangement or understanding had been reached between any large shareholder and ICULS holders that they would only convert them upon maturity or that conversion would likely take place only upon IUB shares hitting RM2.

[81] It is clear that the plaintiffs were ill-advised on this score for the abridged prospectus states at para. 2.2 (with respect to the prospect of conversion of the ICULS into ordinary shares of IUB) that:

> The ICULS-B are convertible into new Idaman Unggul Shares, at any time from and including the date of issuance of the ICULS-B up to and including the maturity date …

[82] In due fairness to Amin, the 2nd defendant's publication Equity Focus did say that the conversion of both ICULS-A and ICULS-B "will likely to happen when IUB share price hits above RM2" and its Company Update did say that they believed the two ICULS "will only be converted upon their maturity date ie, three years and five years respectively, due to an arrangement between the largest shareholder and ICULS holders as indicated by IUB's management."

[83] The timing of the conversion was crucial. If the ICULS were converted before their respective maturity date, the value of IUB shares would be compromised through dilution before their objective of achieving capital gains in the short and medium term. It was therefore incumbent upon Amin to verify the understanding reached between the ICULS holders and the largest shareholder in order that the plaintiffs could be appropriately advised. It is not enough merely to draw the attention to what were said in the two publications.

Declaration Of Dividends

[84] Thirdly, the abridged prospectus itself did not say that IUB would pay a dividend by 2003, thereby rendering the claim that the plaintiffs may reap a dividend yield of 3% and that the suggested P.E. of 9.0 X which was based on the estimated fair value of RM2.29, baseless and misleading.

[85] On the contrary, para. 7.5 of the abridged prospectus states:

> **7.5 Dividends**
>
> IHMB did not declare any dividends for the financial year ended 31 December 2002 and Idaman Unggul does not expect to be able to declare any dividends for the financial year ending 31 December 2003.
>
> However, Idaman Unggul may declare dividends to its shareholders in the future once Idaman Unggul Group returns to profitability.

[86] But this is only saying the obvious. It did not alter the fact the company did not expect to be able to declare dividend for 2003.

[87] This was reiterated at Note 24 of the Notes to Quarterly Report for the second quarter ended 30 June 2003 in the abridged prospectus which states:

> **24. Dividend**
>
> The directors do not recommend any dividend to be paid for the period under review.

[88] The abridged prospectus at para. 7.4 *(infra)* clearly indicates that for the six months ending 30 June 2003, IUB suffered a net loss of RM114,006,000 (infra). Amin's advice that the management intends to pay a dividend by 2003 and that it had indicated a

A minimum dividend yield of 3% (which in turn would represent a discount of 3% on the offer price of the share) flies in the face of what was said in the abridged prospectus.

Profit Forecasts

B **[89]** Fourth, the abridged prospectus posted a grim profit forecast of the IUB in contrast to Amin's advice that a "forecast profit of RM40 million was achievable for the year 2003" relying on forecast net profit of Tahan (the core business of IUB after the reverse takeover exercise) in Equity Focus and Company Update.

C **[90]** Paragraph 7.4 of the abridged prospectus states:

> **7.4 Earnings**
>
> The Restructuring Exercise is expected to be completed by the fourth quarter of 2003 i.e. in the financial year ending 31 December 2003. Idaman Unggul Group's performance for the financial year ending 31 December 2003 will be affected by the assumption of liabilities of IHMB Group pursuant to the Creditors' Scheme of Arrangement. Idaman Unggul Group is expected to return to profitability thereafter.

D E **[91]** Note 22 of the Notes to Quarterly Report for the second quarter ended 30 June 2003 in the abridged prospectus states:

> **22. Current Year Prospects**
>
> The Group expects the current year to continue to be another difficult year while the Group is undergoing the implementation of its proposed restructuring exercise in the current year.

F And Note 25 shows Earnings/(Loss) Per Share ("EPS") as follows:

G

25. Earnings/(Loss) Per Share ("EPS")	**6 months ended 30.6.2003**	**6 months ended 30.6.2002**	**6 months ended 30.6.2003**	**6 months ended 30.6.2002**
(a) Basic EPS				
Net profit/(loss) for the period (RM'000)	(29,039)	(36,220)	(114,006)	(64,187)
Weighted average number of ordinary shares in issue ('000)	559,970	559,970	559,970	559,970
Basic EPS (sen)	(5.19)	(6.47)	(20.36)	(11.46)

H I

The Failure Of The 1st Defendant To Call Amin To Give Evidence

[92] A salient feature of the trial is the fact that the 1st defendant's CEO Amin was not called to give evidence to rebut what the plaintiffs testified with respect to the recommendation he gave that induced them to purchase the IUB shares.

[93] Following the recent Federal Court decision in *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 two consequences must flow from such a failure. First, the plaintiffs' evidence with respect to the recommendation he made would have to be accepted as true. Second, as the non attendance of Amin appears to be deliberate as no subpoena had been applied for to compel his attendance, an adverse inference would have to be drawn against the 1st defendant to the effect his evidence would not be favourable to the 1st defendant.

Finding

[94] Under s. 40A of the SIA, all that the plaintiffs need to prove is that the adviser did not have a reasonable basis to make the recommendation causing them to suffer loss by reason of having invested in IUB shares as recommended.

[95] All that is required of the plaintiffs is to rely on the presumptive provision of s. 40A(2)(b) and (c) to prove that the 1st defendant had not given such consideration to, and had not conducted such investigation into the proper worth of IUB shares offered for private placement as may be reasonable under the circumstances; and that the recommendation was not based on such consideration and investigation. The 1st defendant would be liable under s. 40A(4)(d) only upon proof of loss or damage as a result of acting on such recommendation. The vagaries of the stock market causing the loss would not be a factor. (See *Borg & Ors v. Northern Rivers Finance Pty Ltd & Ors, (supra)*, at para. 34 on 'causal link' discussed earlier)

[96] Section 40A itself provides a civil liability under subsection (4), where an adviser contravenes subsection (1) by making the recommendation to a person and that person relied on the recommendation under such circumstances that he would reasonably be expected to do so, the adviser shall be liable to pay damages to the person.

[97] It is my finding that the plaintiffs had been ill advised to purchase the IUB shares and I accept the uncontroverted evidence of the plaintiffs that had it not for the recommendation of the 1st defendant through its CEO Amin, they would not have purchased the shares. It is clear to me that the 1st defendant had not given such consideration to, and conducted such investigation of, IUB shares as may be reasonable in all the circumstances, and had not based his recommendation on such consideration and investigation as required under s. 40A(2)(b) and (c) of the Act.

[98] Under s. 40A(6) the adviser may be exonerated from liability if it is proved that the recommendation he made was appropriate having regard to the information he had about the person's investment objectives, financial situation and particular need. The 1st defendant has not provided such proof.

Liability Of The 1st Defendant At Common Law

[99] To succeed in negligence at common law the plaintiffs would have to prove that the defendant owed them a duty of care; that there was a breach of that duty of care; and that in consequence thereof they suffered loss (*Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585).

[100] In the context of the present claim, the duty of care imposed on the 1st defendant as an adviser would be the duty not to give negligent advice within the known investment objectives of the plaintiffs. But the mere fact that the IUB shares had failed to make a gain at the KLSE without more does not mean that the 1st defendant had breached its duty of care. I would accept as correct the submission of counsel for the 1st defendant that by reason of the unpredictable nature of the stock market, losses could not of themselves provide evidence of negligence on the part of the 1st defendant for they could well be due to factors outside what had been recommended.

[101] I accept the view expressed by Mocatta J in *Stafford and another v. Conti Commodity Services Ltd* [1981] 1 All ER 691 at 698, (as submitted by counsel for the 1st respondent) with respect to the uncertainty of the commodity exchange (which applies equally to the stock exchange), that:

> … losses in the ordinary course of things do occur even if proper care is used when one is dealing with transactions on the commodities futures market. It is quite impossible to say that the losses here were on the evidence before me, caused by bad advice given by Mr. Dobell in as much as so many decisions were Mr. Stafford's. That Mr. Dobell brought to Mr. Stafford's notice various different opinions and would not hide from him any facts which he was able to obtain in relation to any of these particular commodities I am satisfied. I am also satisfied that with the best advice in the world, in such an unpredictable market as this, it would require exceedingly strong evidence from expert brokers in relation to individual transactions to establish negligence on the part of the defendants. Such negligence cannot, in my judgment, be established merely by relying on the doctrine of *res ipsa loquitur*, which in my judgment, has no application to the facts of the case.

[102] The passage was approved by the Court of Appeal in *Re Merill Lynch Futures Inc & York House Trading Ltd and Another*, The Times 28 June 1984, per Griffith LJ, (Cumming-Bruce, Griggith LJJ concurring)

> I agree entirely with the learned judge, and Mr. Justice Mocatta expressed the same view in *Stafford v. Conti Commodities Services Limited* [1981] 1 All ER 691, that the mere fact that a deal is unsuccessful is not of itself sufficient to raise the inference that the advice to enter into it was necessarily negligent.

[103] Merely proving that the advice was contrary to what was stated in the prospectus or was based on wrong information would not be sufficient to prove that the 1st defendant was negligent at common law as the loss at the stock exchange may be due to other factors not related to any advice that the 1st defendant may have given. As no expert (nor any other witness) was called by the plaintiffs to prove that the failure had a correlation with the negligent advice of the 1st defendant, the plaintiffs' claim against the 1st defendant on the tort of negligence is plainly unsustainable.

[104] The same consideration would apply to an action based on breach of fiduciary duty. It is trite that a professional investment adviser is in a position of trust and therefore owes his client a fiduciary duty to act in the client's best interest, but the same causal link would still have to be established.

Liability Of The 2nd Defendant Under ss. 86 And 87A Of The SIA

[105] To determine whether the 2nd defendant can be found liable under s. 86 or s. 87A it would be necessary to set them out in full together with the civil liability provision of s. 88A to which they co-relate.

[106] Section 86 read:

> **86. False or misleading statements, etc.**
>
> Subject to section 87B, a person shall not make a statement, or disseminate information, that is false or misleading in a material particular and is likely to induce the sale or purchase of securities by other persons or is likely to have the effect of raising, lowering, maintaining or stabilising the market price of securities if, when he makes the statement or disseminates the information:
>
> (a) he does not care whether the statement or information is true or false; or
>
> (b) he knows or ought reasonably to have known that the statement or information is false or misleading in a material particular.

[107] Section 87A (of which only (c) may be relevant) read:

> **87A. Use of manipulative and deceptive devices**
>
> Subject to section 87B, it shall be unlawful for any person directly or indirectly in connection with the purchase or sale of any securities:
>
> (a) to use any device, scheme or artifice to defraud;
>
> (b) to engage in any act, practice or course of business which operates or would operate as a fraud or *deceit* upon any person; or
>
> (c) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading.

And s. 88A read:

88A. Civil liability for contravention of sections 84, 85, 86, 87, 87A and 88

(1) Where a person contravenes section 84, 85, 86, 87, 87A or 88, any other person who entered into a transaction for the sale and purchase of securities with the first-mentioned person or with a person acting on behalf of the first-mentioned person may, by civil action against the first-mentioned person or against any person acting on behalf of the first-mentioned person, recover the amount of loss suffered by that other person:

(a) whether or not the first-mentioned person or any person acting on his behalf has been charged with an offence in respect of the contravention; or

(b) whether or not a contravention has been proved against the first-mentioned person or any person acting on his behalf in a prosecution.

(2) In this section, "loss" includes an unrealised loss in the price or value of securities being the difference between:

(a) the price or value of securities in a transaction in which the person bringing the action claims to have suffered loss; and

(b) the price which would have been the likely price of the securities in the transaction, or the value which it is likely that such securities would have had at the time of that transaction, if the contravention had not occurred.

(3) This section shall not affect any liability under any other written law in respect of the conduct constituting the contravention.

[108] It is at once discernible that under s. 88A, civil liability for loss founded under s. 86 or s. 87A of the SIA, can be imposed on the 2nd defendant only if the 2nd defendant or persons acting on its behalf "had entered into a transaction for the sale or purchase" of the IUB shares with the plaintiffs.

[109] The evidence of Raja Indra Putra bin Raja Ismail (the 2nd defendant's witness) is clear. The 1st and 2nd defendants despite being subsidiaries of Malayan Banking Berhad were separate legal entities and operated independently of each other. With respect to the sale of IUB shares in this case, his uncontroverted evidence

A is that the 1st defendant was in its own right an institutional client of the 2nd defendant. The IUB shares were subscribed by the 2nd defendant from Hwang-DBS, the placement agent. The 1st defendant then subscribed them from the 2nd defendant for private placement to its client. His evidence is consistent with the B fact that the respective Investment Management Agreements that the plaintiffs entered into was with the 1st defendant and that not a word is mentioned therein of the 2nd defendant.

[110] It follows therefore, the plaintiffs' claim against the 2nd C defendant under s. 86 and s. 87A read with s. 88A of the SIA must fail.

Liability Of The 2nd Defendant At Common Law

[111] As for the liability of the 2nd defendant this would have to D be decided on the law governing negligent misstatements given by a person who has no contractual nexus with the receiver of the statement. The law as accepted here in our jurisdiction is to be found in the House of Lords decision in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1963] 2 All ER 575, in the speech of E Lord Morris (at 594B) that:

> ... if someone possessed of a special skill, undertakes quite irrespective of contract, to apply that skill for the assistance of another who relies on such skill, a duty of care will arise. The F fact that the service is to be given by means of, or by the instrumentality of, words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful enquiry, a person takes on himself to give information or advice to, or allows his information or advice to G be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.

[112] The *Hedley Byrne* case is also authority that a properly worded disclaimer may exonerate the maker of a negligent misstatement from liability. This is to be found more distinctly, in H the speech of Lord Devlin:

> I should consider it necessary to examine these contentions were it not for the general disclaimer of responsibility which appear to me to be in any event conclusive. I agree entirely with the I reasoning and conclusion on this point of my noble and learned friend, Lord Reid. A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not.

[113] In my judgment, the plaintiffs' claim against the 2nd defendant under the common law is plainly unsustainable on the following grounds:

[114] Firstly, on evidence it is clear that the plaintiffs did not rely on the two publications, Equity Focus and Company Update, when they decided to purchase the IUB shares. The evidence shows they relied on the advice of Amin. I agree with the submission of counsel for the 2nd defendant that it was his sales pitch that caused them to buy those shares. The two publications were only handed over to them to read after Amin had recommended the purchase.

[115] Secondly, the plaintiffs had not proved the causative element of the law on negligence attributing their loss at the KLSE to the breach of duty of care of the defendants by expert evidence discussed earlier.

[116] Thirdly, even if negligence could be proved, the 2nd defendant should be able to rely on the similarly worded disclaimer appearing in both the publications which read:

> This report is for information purposes only and under no circumstances is it to be considered as an offer to sell or a solicitation of an offer to buy any securities referred to herein … consequently no representation is made as to the accuracy and completeness of this report and it should not be relied upon as such.

[117] The disclaimers were conclusive and decisive and in my judgment, they afford the 2nd defendant an effective defence against any claim for economic loss from any stranger who may despite the warning, have relied on the statement in these publications.

Order

[118] The plaintiffs' claim against the 1st defendant under prayer (4) is allowed with costs. The damages or loss incurred by the plaintiffs under s. 40A(4) of the SIA is to be assessed by the Senior Assistant Registrar.

[119] The plaintiffs' claim against the 2nd defendant is dismissed with costs.